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No. 82-...
IN THE

Supreme Court of the United States

October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM A. COBB, JR., HOWARD C. DENNIS, JOHN L. CONNOLLY, JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL, ALEXANDER RADOS and WILLIAM SCHMIDT, each in his respective capacity as Trustee of the Operating Engineers Health and Welfare Fund; WILLIAM C. WAGGONER, FRANK TODD, WILLIAM C. COBB, JR., FREEMAN ROBERTS, DALE VAWTER, JOHN L. CONNOLLY, C. V. HOLDER, JOHN BEBEK, KENNETH J. BOURGUIGNON, HOWARD C. DENNIS, JAMES J. KIRST and JOHN C. MAXWELL, each in his respective capacity as Trustee of the Operating Engineers Pension Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, WILLIAM C. COBB, JR., HOWARD C. DENNIS, ALEXANDER RADOS, JOHN BEBEK, JAMES J. KIRST, JERALD B. LAIRD and C. I. T. JOHNSON, each in his respective capacity as Trustee of the Operating Engineers Vacation-Holiday Savings Trust; WILLIAM C. WAGGONER, FRANK TODD, FREEMAN ROBERTS, DALE VAWTER, VERNE W. DAHNKE, WILLIAM A. FLOYD, ALEXANDER RADOS, WILLIAM SCHMIDT, HOWARD C. DENNIS, C. I. T. JOHNSON, JOHN BEBEK and ROBERT LYTLE, each in his respective capacity as Trustee of the Operating Engineers Journeymen and Apprentice Training Trust,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

(Cover Continued on Inside Front Cover)

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Question Presented.

Whether the federal courts, in actions brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, may consider or apply both state law and related federal statutes which authorize an award of attorneys' fees to the prevailing party in a breach of contract action?

This precise issue was presented to the Court by Petitioner in *Northwest Excavating, Inc. v. Waggoner*, ___ U.S. ___, 71 L.Ed.2d (1982), *vacating* 642 F.2d 333 (9th Cir. 1981), but was not addressed by the Court in its Order vacating the Ninth Circuit's earlier decision below and remanding the matter for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 445 U.S. 72 (1982).

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No. 82-...

IN THE

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October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 3, 1982, after remand of the matter from this Court.

Citations to Opinions Below.

The Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California (CV-77-3701-WMB), printed in Appendix B, *infra*, were not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit, printed in Appendix C, *infra*, is reported in 642 F.2d 333. The order of the court of appeals, denying Respondents' petition for rehearing, is printed in Appendix D, *infra*. The order of the court of appeals, denying Petitioner's petition for rehearing, is printed in Appendix E, *infra*. The order of this Court vacating the court of appeals' judgment and remanding the matter for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), printed in Appendix F, *infra*, is reported in ___ U.S. ___, 71 L.Ed.2d 640. The

opinion of the United States Court of Appeals for the Ninth Circuit on remand, dated September 3, 1982, and printed in Appendix G, *infra*, is reported in 685 F.2d 1224.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1982, Appendix G, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

The United States statutes involved are Section 301 of the Labor Management Relations Act, 1947, as amended, 61 Stat. 156, 29 U.S.C. § 185(a), Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e). The California statute involved is California Civil Code § 1717. These statutory provisions are set forth in Appendix A, *infra*.

Statement of the Case.

This petition seeks review of a judgment of the United States Court of Appeals for the Ninth Circuit upholding an order of a district court in an action brought by Respondents (the trustees of four jointly administered multi-employer trust funds) compelling, *inter alia*, the payment of Respondents' attorneys' fees by Petitioner. The jurisdiction of the district court was invoked under Section 301 of the Labor Management Relations Act, 1947, as amended (herein the LMRA), 61 Stat. 156, 29 U.S.C. § 185.

Petitioner is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. Petitioner is a mem-

ber of the Southern California General Contractors Association (herein the Association); as such, Petitioner was bound to the Master Labor Agreement (herein the "MLA") negotiated between International Union of Operating Engineers, Local Union No. 12 and the Association. The MLA obligated Petitioner to pay fringe benefit contributions to the trust funds for each hour worked under the MLA by Petitioner's employees.

In their suit, Respondents claimed that Petitioner was obligated, but refused, to pay fringe benefit contributions to the trust funds for hours worked by independent owner-operators dispatched by Petitioner in its capacity as a broker for such services, and for hours worked by Frank Sandoval (herein Sandoval), an independent contractor, to perform maintenance and repair work on Petitioner's equipment.

After a trial on the merits, the district court ruled that Petitioner was not obligated to make contributions for owner-operators dispatched by it as a broker. The district court determined that, under the terms of the MLA, the general contractor to which the owner-operators were dispatched, and not Petitioner, had the obligation, if any existed, to treat the owner-operators as employees and to make contributions for them. The court of appeals upheld the district court's interpretation of the MLA in this respect.

The district court also held that Sandoval was an independent contractor, and not an employee of Petitioner. The district court ruled, however, that Petitioner breached the MLA by utilizing "non-employees" to perform maintenance and repair work on its equipment and that the trust funds, therefore, had been damaged in an amount equal to the contributions that Petitioner would have been obligated to pay if it had utilized "employees" to perform the work. In reaching this conclusion, the lower court specifically rejected Petitioner's contention that the operative provisions

of the MLA were void and unenforceable because they violated Section 8(e) of the LMRA, 73 Stat. 519, 29 U.S.C. § 158(e).

The court of appeals upheld the district court's finding that Petitioner breached the MLA by assigning repair work to Sandoval. In doing so, the court refused to consider Petitioner's defense that the subcontracting provisions of the MLA were "hot cargo" clauses which are proscribed under § 8(e).

Prompted by the court of appeals' refusal to consider Petitioner's statutory defense, on November 2, 1981, Petitioner filed with this Court a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Thereafter, this Court issued its decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), which decision resolved the first issue presented by Petitioner herein.[1] Accordingly, by order dated February 22, 1982, this Court vacated the court of appeals' judgment and remanded the matter for further consideration in light of *Kaiser Steel Corp., supra*.

On remand, the court of appeals addressed, but rejected, Petitioner's defense founded on § 8(e), ruling that the contested contractual provision lawfully preserved bargaining

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[1]In its petition, Petitioner presented this Court with the following questions:

> "(1) Whether the federal courts, in suits brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, are precluded from entertaining an affirmative defense that the contractual provisions sought to be enforced in such suits are 'hot cargo' clauses which are proscribed by Section 8(e) of that Act, (29 U.S.C. § 158(e)), and which, therefore, are 'unenforceable and void' as a matter of law?
>
> "(2) Whether the federal courts, in actions brought under Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 185, may consider or apply both state law and related federal statutes which authorize an award of attorneys' fees to the prevailing party in a breach of contract action?"

unit work. In light of that ruling, the court also refused to award Petitioner its attorneys' fees incurred for that portion of Respondents' action on which Petitioner prevailed, holding that application of California Civil Code § 1717, requiring mutuality of attorneys' fees entitlement, would violate this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and would frustrate the federal labor policy embodied in § 301 of the LMRA. Moreover, without any regard to Petitioner's success on several substantial issues of fact and law, the court of appeal, looking only to the strict wording of the MLA, overruled the district court and directed an award of attorneys' fees to Respondents for their partial success in the action.

REASON FOR GRANTING THE WRIT.

The Decision Below Regarding Attorneys' Fees Conflicts With Applicable State Law, Related Federal Statutes, and Decisions of This Court.

The question of whether state law authorizing an award of attorneys' fees to the prevailing party in breach of contract actions should be applied in actions brought under Section 301 of the LMRA, and the application of ERISA's[2] provisions to such actions, has never been determined by this Court.

The decision of the court below directly conflicts with California law, as the court of appeals specifically rejected state law in order to judicially create a uniform national attorneys' fees rule in § 301 actions. In fashioning a new national attorneys' fees rule, however, the court of appeals totally ignored *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), wherein this Court held that it was proper in a § 301 suit to apply the Indiana 6-year statute of limitations, rather than judicially fashioning a uniform national statute of limitations for such actions. *Id.* at 704-05. In *Hoosier Cardinal*, this Court specifically ruled that uniformity alone did not supply a reason for ignoring applicable state law in § 301 suits and for engaging in drastic "judicial legislation." *Id.* at 703. This Court recently reaffirmed *Hoosier Cardinal* in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981).

Even in determining which substantive law to apply in § 301 suits, this Court has declared that "state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate federal

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[2]Employee Retirement Income Security Act of 1974, as amended, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.*

policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957); *see also John Wiley & Sons v. Livingston*, 376 U.S. 543, 548 (1964) ("Federal law, fashioned 'from the policy of our national labor laws controls.' [Citation.] State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case. . . .").

Petitioner submits that the mutuality principle embodied in California Civil Code § 1717 is consonant with the explicit congressional design behind the national labor laws. Both Section 502(g) of the Employee Retirement Income Security Act of 1974 (herein ERISA), 88 Stat. 891, 29 U.S.C. § 1132(g), and Section 4301(e) of the recently enacted Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1263, 29 U.S.C. § 1451(e), amending ERISA, specifically provide that the court, in its discretion, *may allow* attorneys' fees and costs to the prevailing party.

ERISA authorizes suits by and against employee benefit trust funds, and is clearly applicable federal law to which the federal courts should look in deciding whether attorneys' fees may properly be awarded in § 301 actions to compel the payment of assertedly delinquent trust fund contributions. The court of appeals totally ignored this relevant federal statute in rejecting the mutuality rule embodied in California law.

Moreover, the court of appeals' decision granting attorneys' fees to Respondents based on the MLA's one-sided provision, notwithstanding that Respondents did not prevail on a substantial portion of their action, frustrates the inherent principles of fairness and justice that Congress sought to embody in § 301. By applying the MLA to Respondents' unilateral advantage, the court below casts upon would-be defendants a serious dilemma: On one

hand, a defendant sued under a contract with a one-sided attorneys' fee provision should, like all other litigants, present those defenses that are reasonably available, and should pursue them with an appropriate level of vigor. On the other hand, under the court of appeals' decision, the defendant does so at the risk of losing far more than he may have bargained for. Should he lose, he will be liable not only for the damages sought in the suit on the merits, but also for the attorneys' fees incurred by the plaintiff in rebutting the defendant's own arguments; yet, if he should win, he would still be responsible for at least his own attorneys' fees incurred in pursuing a successful defense. Petitioner submits that such a dilemma is inequitable; indeed, it presents defendants in trust fund actions such as this with a painfully real no-win situation.

Certainly contractual provisions requiring the party found to be in breach to pay attorneys' fees serve a useful and laudible function, in that they discourage dilatory tactics and encourage compliance with contractual obligations. At the same time, principles of fairness and justice dictate that such provisions not be interpreted to overreach their usefulness by discouraging good faith and possibly meritorious defenses. The vice in such provision is obvious: a defendant may be reluctant to interpose a defense that quite possibly would succeed because the potential exposure, should the defense fail, would be too great. Nor is the problem remedied by the possibility that a meritorious defense will result in a defense verdict, and hence no liability for fees, since, absent a mutual right to recover one's own fees, the inherent uncertainties of litigation will no doubt deter the presentation of some viable defenses before they can be offered to the courts for determination. Thus, the provision might serve in many cases to coerce a defendant to settle the case on the trust funds' terms, or to try the case with something less

than the total commitment that the adversary system demands. The only way to blunt the harsh deterrent effect created by such a provision is to imply a mutuality entitlement to attorneys' fees via application of California Civil Code § 1717 if the defense should prevail.

This Court must be aware of the fact that innumerable employers in the construction industry are unable to withstand the financial burden of protracted litigation with trust funds whose combined assets far exceed the individual contractor's assets. Also, thousands of small contractors are essentially forced to sign short form contracts to master labor agreements, as in the instant case, which contain provisions of questionable legality. These small contractors do not, in reality, participate in collective bargaining negotiations. And, in actual application, such agreements are often nothing more than adhesion contracts. The mutuality principle was designed to protect such parties.

Many contractors are forced into compromising their positions rather than challenging either the accuracy of the trust funds audits or the validity of the trust funds' claims, which claims are sometimes based upon illegal and unenforceable contract provisions. Of course, the cumulative impact of the use of economic pressure under the veil of contract enforcement to force contractors to do, or agree to do, something that they had not agreed to in collective bargaining, or which is otherwise illegal, invariably leads to a breakdown in the faith which unions and employers alike must have in collective bargaining, which faith is so fundamental to the workings and success of the national labor laws.

The mutuality policy embodied in California Civil Code § 1717 obviates such an unjust, absurd result; it should be imported in federal labor law in order to lessen the coercive impact of claims such as those brought by the Respondents

herein. Far from frustrating the congressional design behind the national labor laws, § 1717 assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith, meritorious defenses to claims such as this. The clear congressional policy of enforcing *only* those duties and obligations to which the parties agreed during collective bargaining and/or are bound to as a matter of law would thus be served.

A contractual provision allowing attorneys' fees to only one party is unfair and contrary to public policy. Such a provision upsets the delicate balance of power in labor relations which is necessary for effective collective bargaining. In reaching its decision, however, the court below essentially jettisoned a balanced national labor relations policy by refusing to entertain a mutuality approach, sanctioned under both the state and federal statutes, in determining an entitlement to an award of attorneys' fees.

It is submitted, therefore, that the court below, by declining to award attorneys' fees and costs to Petitioner for its defense of this action, at least to the extent that it has prevailed, substantially departed from this Court's *Hoosier Cardinal* rule, ignored the relevant recent expressions of congressional intent on attorneys' fees entitlement under ERISA, and directly contradicted otherwise applicable state law.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWIN H. FRANZEN,
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JAMES G. JOHNSON,
HILL, FARRER & BURRILL,
By JAMES G. JOHNSON,
Attorneys for Petitioner,
Northwest Excavating, Inc.

APPENDIX A.

Statutory Provisions Involved.

1. Section 301 of the Labor Management Relations Act, 1947, as amended, 29 U.S.C., Section 185(a), provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

2. Section 502(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C., Section 1132(g), provides in pertinent part:

> "(1) In any action under this title by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.
>
> (2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 U.S.C.S. §1145] in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate."

3. Section 4301(e) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C., Section 1451(e) provides:

"In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party."

4. Section 1717 of the California Civil Code provides:

"In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

As used in this section 'prevailing party' means the party in whose favor final judgment is rendered."

APPENDIX B.

Findings of Fact, Conclusions of Law and Order of the United States District Court, Central District of California.

United States District Court Central District of California.

William C. Waggoner, *et al.*, etc., Plaintiffs, vs. Northwest Excavating, Inc., *et al.*, Defendants. Case No. CV 77 3701 FJK.

Filed: June 28, 1978.

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

PROPOSED FINDINGS OF FACT

1. This is an action by trustees to recover fringe benefit contributions allegedly due from defendant under the terms of a Collective Bargaining Agreement between Local Union No. 12, International Union of Operating Engineers, AFL-CIO, and certain employer associations. The employee trust funds were established pursuant to 29 U.S.C. 186(c).

2. The court has jurisdiction of this action under 29 U.S.C. 185(a) of the Labor Management Relations Act. Since the action is based upon an alleged Collective Bargaining Agreement between defendant and the International Union of Operating Engineers, Local Union No. 12, AFL-CIO, a labor organization which represents employees in an industry affecting commerce pursuant to 29 U.S.C. 152(5). The claims arise out of defendant's alleged failure to pay certain fringe benefit contributions to the plaintiffs in accordance with the provisions of the Collective Bargaining Agreement.

3. Plaintiffs are the trustees of the Operating Engineers Health and Welfare Fund, Pension Trust, Vacation-Holiday Savings Trust, and the Journeymen and Apprentice Training

Trust, all established by the representatives of Local Union No. 12 and representatives of various multi-employer associations in Southern California and Southern Nevada. The trusts are express trusts created pursuant to 29 U.S.C. 186(c)(5) to receive payments from employers on behalf of employees under the Collective Bargaining Agreement.

4. Defendant Northwest Excavating, Inc., and its predecessor Northwest Compaction Co., Inc., are and were California corporations organized and existing under the laws of the State of California. Northwest Excavating, Inc., is the successor in interest to Northwest Compaction Co., Inc. Northwest is engaged in the business of renting construction equipment with an operator to building contractors. Northwest is also engaged as a broker in referring independent contractors to construction contractors.

5. Northwest is bound to a Collective Bargaining Agreement with the Union by virtue of membership in the Southern California Contractors Association, an employer group which represents employer-members for purposes of collective bargaining. Defendant is obligated by the agreement to pay to the trustees of the trusts a specified rate of contribution per hour on behalf of employees who perform work covered under the agreement.

6. Pursuant to the agreement, defendant submitted monthly written report forms to the trustees on which forms defendant listed the names of and hours worked by employees of defendant during said months as employees covered under the Collective Bargaining Agreement. Defendant accurately reported and paid all contributions due and as shown to be due by the monthly report forms.

7. From November, 1975, defendant has engaged Frank Sandoval doing business as Sandoval Equipment Repair to perform repair and maintenance to defendant's equipment.

8. Frank Sandoval doing business as Sandoval Equipment Repair has been engaged as an independent contractor in the business of repairing construction equipment since approximately 1971.

9. Frank Sandoval is a self-employed person and an independent contractor and is not an employee of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

10. In the course and conduct of his business, Frank Sandoval utilizes the services of other equipment repair personnel. These persons are not employees of defendant within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency.

11. Frank Sandoval and those who work with him are not subject to control by defendant. It is not within the power of defendant to exercise control over Frank Sandoval and/or those who work with him.

12. The following are independent contractors and are not employees of Northwest, within the meaning of the Act, the Collective Bargaining Agreement, the trust agreements and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel

l. W. G. Burns
m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

13. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid on hours worked by Frank Sandoval and those individuals who work with him.

14. The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by any owner-operator utilized by Northwest in its capacity as a broker.

15. The independent owner-operators referred by Northwest to construction contractors are not employees of Northwest. The independent owner-operators are independent contractors within the meaning of the Act, the Collective Bargaining Agreement and the trust agreements.

16. The owner-operators utilized by Northwest in its capacity as a broker are not those as to whom Northwest owed any obligation to the plaintiffs, for any reason, contractual or otherwise, to make deductions and remit contributions to the trusts.

17. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., and 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

18. The subcontracting clauses, including Paragraph 22, Page 13 in the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June

15, 1980 (Plaintiff's Exhibit "2") are lawful and enforceable and not in violation of 29 U.S.C. 158(e).

19. The plaintiffs are not entitled to liquidated damages from defendant.

20. Plaintiffs are not entitled to an award of attorney's fees against defendant.

21. Defendant is not entitled to an award of attorney's fees against plaintiffs.

22. Plaintiffs are not entitled to an award of costs, or other costs of suit, against defendant.

23. Defendant is not entitled to an award of costs, or other costs of suit, against plaintiffs.

24. The plaintiffs caused to be published and disseminated to the signatories to the Collective Bargaining Agreement instructions that no employer shall pay trust fund contributions on behalf of any owners, owner-operators, partners, self-employed persons or any person other than a bona-fide operating engineer.

25. Defendant did not refuse to produce or make available to plaintiffs the relevant payroll records requested by plaintiffs.

26. Defendant has not failed to pay fringe benefit contributions as required by the valid and enforceable provisions of the Collective Bargaining Agreement. There is not due and owing to plaintiffs any interest upon such alleged unpaid fringe benefit contributions since no such unpaid fringe benefit contributions exist.

27. Plaintiffs are not entitled to liquidated damages since no trust fund contributions are owed to plaintiffs by defendant. Plaintiffs are not entitled to expenses incurred in any audits of defendant's records.

28. That defendant in proceeding as it did as to utilizing the services of Sandoval and the individuals who work with

him breached defendant's contractual obligations under Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 (Plaintiff's Exhibit "1") and Article I, Paragraph B(3), Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980.

29. The damages flowing from defendant's breach is measured by the amount of contributions that would have been due and paid by defendant if Sandoval and the individuals who work with him were employees of defendant within the provisions of the Collective Bargaining Agreement.

PROPOSED CONCLUSIONS OF LAW

1. Northwest is bound to the Collective Bargaining Agreement with Local 12 by virtue of its membership in the Southern California Contractors Association.

2. Northwest is not required to pay contributions into the employee fringe benefit trust funds on behalf of persons who are not "employees" within the meaning of 29 U.S.C. 152 et seq., 29 U.S.C. 186 et seq., 26 U.S.C. 401, the Collective Bargaining Agreement, or the trust agreements.

3. Frank Sandoval and those individuals who work with him are not employees of Northwest within the meaning of 29 U.S.C. 152(3), 29 U.S.C. 186(c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on hours worked by Frank Sandoval and those individuals who work with him.

No employee trust fund contributions can be compelled to be made by Northwest on behalf of Frank Sandoval and those who work with him, to plaintiffs.

4. Owner-operators utilized by Northwest in its capacity as a broker are independent contractors and not employees of Northwest within the meaning of 29 U.S.C. 152(3), 29 U.S.C. 186(c), the Collective Bargaining Agreement, the trust agreements, or the common law of agency.

The Collective Bargaining Agreement does not provide that benefits or that contributions be paid by Northwest on owner-operators utilized by Northwest in its capacity as a broker. No employee trust fund contributions can be compelled to be made by Northwest on behalf of owner-operators utilized by Northwest in its capacity as a broker.

5. The following are independent contractors and are not employees of Northwest within the meaning of the Act, the Collective Bargaining Agreement, and/or the common law of agency:

a. R. C. Becker
b. Bud Lowe
c. A. O. Strand
d. N. H. Dunaway
e. Bruce Buell
f. Bill Kilmer
g. Jose Luis Sanchez
h. G. MacDonald
i. Robert Buell
j. Jim Edding
k. Buzz McDaniel
l. W. G. Burns
m. Dean Goddard
n. Dave Edding
o. Lynn Peterson
p. Charles Popham
q. Sam Chewning

The Collective B[illegible]ining Agreement does not provide that Northwest pay [illegible]efits or contributions on these independent contractors to the plaintiffs. No employee trust

fund contributions can be compelled to be made by Northwest on behalf of said independent contractors.

6. Paragraph 22, Page 13 of the Collective Bargaining Agreement effective July 1, 1974 through June 30, 1977 and Article I, Paragraph B, Page 45 of the Collective Bargaining Agreement effective July 1, 1977 to June 15, 1980, are lawful and enforceable and not proscribed by 29 U.S.C. 158(e).

That Northwest breached its contractual obligations to plaintiffs under said Paragraphs of the Collective Bargaining Agreements by utilizing Frank Sandoval and those who work with him to maintain and repair its equipment.

The damages to plaintiffs occasioned by said breach is measured by the amounts of contributions that would have been due and paid by defendant to plaintiffs if Sandoval and those who work with him were employees of Northwest within the provisions of the Collective Bargaining Agreement. Said damages are in the sum of $18,993.53.

Let judgment be entered accordingly.

JUNE 28, 1978

/s/ Robert J. Kelleher
ROBERT J. KELLEHER,
United States District Judge

United States District Court Central District of California.

William C. Waggoner, et al., etc., Plaintiffs, v. Northwest Excavating, Inc., etc., Defendant. No. CV 77-3701-RJK.

Filed: June 28, 1978.

JUDGMENT.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment in favor of plaintiffs and against defendant be, and the same hereby is, granted, and that plaintiffs, each in his capacity as Trustee of each respective trust, shall recover damages in the amount of $18,993.53 resulting from the breach by defendant Northwest Excavating, Inc. of certain paragraphs of the Collective Bargaining Agreement.

DATED: June 28th, 1978.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge.

APPENDIX C.

Opinion of the Court of Appeals for the Ninth Circuit.

William C. WAGGONER et al, etc, Plaintiffs-Appellees and Cross-Appellants, v. NORTHWEST EXCAVATING, INC., etc. Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 18, 1980. Decided April 20, 1981. Rehearing Denied May 15, 1981.

Trustees of union trust funds brought action to recover employee fringe benefit contributions from construction equipment rental company. The United States District Court for the Central District of California, Robert J. Kelleher, J., held in favor of the trustees in part and the company in part, and both parties appealed. The Court of Appeals, Pregerson, Circuit Judge, held that: (1) owner-operators dispatched by the construction equipment rental company to do construction work when its own equipment and personnel were unavailable were independent contractors and not the employees of the construction equipment rental company and, therefore, the company did not have to make employee fringe benefits contributions to the union trust funds for the hours worked by such owner-operators; (2) businessman who was hired to perform the repair and maintenance work on the equipment of the construction equipment rental company was an independent contractor, but the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement which obligated it to employ its own employees for repair work and, therefore, the company had to make employee fringe benefit contribution to the union trust fund in an amount equal to what was lost by virtue of its employment of such independent contractor; (3) construction equipment

rental company was not entitled to an award of attorney fees and costs based on California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs; and (4) trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the delinquency in making employee fringe benefit contributions that resulted when the construction equipment rental company wrongfully hired independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquencies in the payment of such contributions.

Affirmed in part and reversed and remanded in part.

1. Labor Relations 131.6

Since construction equipment rental company, which would dispatch owner-operators to do construction work when its own equipment and personnel were unavailable, could exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operator by negotiating the initial rates for the equipment and the operator, such owner-operators were independent contractors and not employees of construction equipment rental company and, therefore, the construction equipment rental company did not have to make employee fringe benefit contributions to union trust funds for the hours worked by the owner-operators. Labor Management Relations Act, 1947, §§ 301, 302(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

2. Federal Courts 776

Construction of contractual provision is a question of law subject to de novo review by the Court of Appeals.

3. Labor Relations 131.6

In provision of master labor contract between multi-employer association and union stating that "the owner-operator shall become a bona fide employee of the Contractor . . . upon reporting for work on the second consecutive day," the term "Contractor" referred to the general contractor and required the general contractor to treat owner-operators as employees and to make employee fringe benefit contributions to union trust funds for the hours worked by such owner-operators. Labor Management Relations Act, 1947, §§ 301, 302(c)(5), 29 U.S.C.A. §§ 185, 186(c)(5).

4. Labor Relations 131.6

Although construction equipment rental company leased its fully equipped repair facilities to businessman who performed the repair and maintenance work on its equipment, there was no evidence that the construction equipment rental company had control over the businessman and, therefore, the businessman was an independent contractor; however, the construction equipment rental company's use of such independent contractor constituted a breach of the master labor agreement, which obligated it to employ its own employees for repair work, and, therefore, company had to make employee fringe benefit contributions to the union trust funds in an amount equal to what was lost by virtue of its employment of such independent contractor.

5. Contracts 10(1)

California statute requiring mutuality in contract provisions dealing with award of attorney fees and costs was not applicable to action by trustees of union trust funds against construction equipment rental company to recover employee fringe benefit contributions and, therefore, although the company prevailed on several issues, it was not entitled to

an award of attorney fees and costs based on such statute. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; National Labor Relations Act, § 8(e) as amended 29 U.S.C.A. § 158(e).

6. Labor Relations 131.6

Trustees of union trust funds were entitled to award of attorney fees, costs, and liquidated damages by virtue of the company's delinquency in making employee fringe benefit contributions that resulted when it wrongfully hired an independent contractor to perform protected union work, where the trustee's claim was based on a provision of the master labor agreement requiring payment of attorney fees, costs, and liquidated damages in connection with delinquency in the payment of such contributions. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Wayne Jett, Los Angeles, Cal., for Waggoner.

James G. Johnson, Hill, Farrer &Burrill, Los Angeles, Cal., on brief; Stanley E. Tobin, Los Angeles, Cal., argued, for defendant-appellant and cross-appellee.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and NELSON, Circuit Judges, and TURRENTINE, District Judge.

PREGERSON, Circuit Judge:

This action was brought by the Trustees of four union trust funds to recover employee fringe benefit contributions from Northwest Excavating, Inc. The Trustees contend that Northwest should have made payments to the trust funds

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

based on the hours worked by one Frank Sandoval and his helpers, and by several owner-operators of construction equipment. After a two-day trial, the district court held Northwest liable solely for contributions for the hours worked by Sandoval and his helpers. The district court declined to award attorney's fees and costs to either party. Both sides appeal.

I. *Facts*

Northwest Excavating, Inc. is a member of the Southern California General Contractors Association, a multi-employer group that bargains collectively on behalf of its members with Local 12 of the International Union of Operating Engineers. As a member of the Association, Northwest signed the Master Labor Agreement (MLA) negotiated between Local 12 and the Association for the years 1974-1977 and 1977-1980. Among other things, the MLA obligates Northwest to pay to the employee benefit trust funds a certain contribution for each hour worked under the MLA by Northwest's employees.

Northwest is primarily engaged in the business of renting construction equipment with operating personnel to building contractors in the construction industry. After receiving a request from a contractor for equipment and operating personnel, Northwest will dispatch its own equipment and personnel, if available. If either or both are unavailable, Northwest then will dispatch independent owner-operators to do the work. The fees earned by the independent owner-operator are paid by the general contractor to Northwest who then tenders the fee to the owner-operator, less a seven percent brokerage commission.

Before November 1975, Northwest employed several people to repair and maintain its own equipment. In November 1975, however, Northwest hired Frank Sandoval

and his helpers to perform the repair and maintenance work. Since 1971, Sandoval has been doing business as Sandoval Equipment Repair.

In 1977 the Trustees of Local 12's employee benefit trust funds informed Northwest that it owed contributions for hours worked by Sandoval, his helpers, and the independent owner-operators Northwest dispatched when its own operators and equipment were unavailable. Northwest refused to contribute, arguing that Sandoval, his helpers, and the owner-operators were independent contractors, not employees, within the meaning of MLA. The Trustees filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover the disputed payments. After a two-day trial, the Honorable Robert J. Kelleher concluded that although Sandoval, his helpers, and the owner-operators are independent contractors, Northwest breached the MLA by employing Sandoval instead of Northwest's own employees to perform the repair work. The court ordered Northwest to tender to the Trustees an amount equal to what the funds lost by virtue of Sandoval's employment. That amount was stipulated to be $18,993.53.

II. *Trustee's Appeal*

The district court found that owner-operators dispatched by Northwest to general contractors were not Northwest's employees but rather were independent contractors. The parties agree that independent contractors, as such, are excluded from the scope of the MLA by virtue of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), authorizing employer contributions to trust funds solely on behalf of employees. The district court also found that although the MLA requires the "Contractor" to put owner-operators on its payroll as of the second day of work, the term "Contractor" refers to general contractors, not to

Northwest acting as a broker. The Trustees argue that these two findings are clearly erroneous.

In distinguishing an employee from an independent contractor, courts apply common law principles of agency to the factual context of each case. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256, 88 S.Ct. 988, 989, 19 L.Ed.2d 1083 (1968)[1] In addressing the issue, this court considers certain factors set forth in the Restatement (Second) of Agency § 220(2):

(a) The extent of control which, by the agreement, the master can exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular operation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

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[1]*NLRB v. United Insurance Co. of America* applied common law agency principles to the term "employee" found in section 2(3) of the National Labor Relations Act, 29 U.S.C. § 152(3). The trust funds are established on behalf of "employees" pursuant to section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). Section 501 of the Labor Management Relations Act, 29 U.S.C. § 142, provides that when used in that Act, the term "employee" shall have the same meaning as when used in the National Labor Relations Act. Therefore the cases interpreting the term "employee" under the National Labor Relations Act are applicable to the analysis here.

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Brown v. NLRB, 462 F.2d 699, 705 n. 10 (9th Cir.), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 441, 34 L.Ed.2d 301 (1972). Specifically, this court has stated that the common law agency test rests primarily on the "amount of supervision that the putative employer has a right to exercise over the individual, particularly regarding the details of the work." *Associated Independent Owner-Operators, Inc. v. NLRB*, 407 F.2d 1383, 1385 (9th Cir. 1969); *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975). This factor, however, must be tempered by other considerations relevant to the relationship in its entirety. *Associated General Contractors of California, Inc. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *Merchants Home Delivery Service, Inc. v. NLRB*, 580 F.2d 966, 973 (9th Cir. 1978) ("Other factors which this court has considered are the entrepreneurial aspects of the individual's business; risk of loss and opportunity for profit; and the individual's proprietary interest in his business.").

[1] The district court correctly concluded that the owner-operators were independent contractors and not employees of Northwest. Each owner-operator dispatched by Northwest was not required to accept the offered construction work. Each was also free to render similar services to other contractors. Each owner-operator set his equipment rental rate with Northwest, but was free to renegotiate the rate with the general contractor if the work proved more difficult or extensive than anticipated. Each was supervised, if at all, by the general contractor, not by Northwest, as to the hours, the extent, and the performance of his work. Northwest's only involvement in the employment relationship was to provide timecards to record the hours worked.

The timecards were returned by the owner-operators to Northwest who then billed the general contractor for the services rendered. The rate billed was an hourly rate combining the equipment usage fee with the charge for the operator's labor. The entire payment—less a seven percent brokerage commission—was remitted by Northwest to the owner-operator. Since Northwest may exercise little, if any, supervision over the owner-operators or their equipment, but merely participated in the employment relationship between the general contractor and the owner-operators by negotiating the initial rate for the equipment and the operator, the district court correctly concluded that the owner-operators were independent contractors and not Northwest's employees.

Notwithstanding the district court's conclusion, the Trustees argue that the MLA required that owner-operators eventually become Northwest's employees even though they began their jobsite work as independent contractors. The relevant provisions of the MLA provide:

> The Owner-Operator shall become a bona fide employee of the Contractor as defined in the Agreement upon reporting for work on the second consecutive working day; such employee status to be effective from the first hour of work performed on the preceding working day. The term CONTRACTOR (or EMPLOYER) shall refer to a person, firm or corporation, party to this AGREEMENT.

The Trustees argue that "Contractor" refers to Northwest as a signatory of the MLA and requires Northwest to place owner-operator on its payroll. Northwest, on the other hand, asserts that the MLA requires the general contractors for whom owner-operators work to include them on the general contractors' payrolls. The district court found that the MLA requires that general contractors, not Northwest acting as

a broker, treat owner-operators as employees and therefore pay the appropriate trust fund contributions.

[2, 3] The construction of a contractual provision is a question of law subject to our de novo review. *Transport Indemnity Co. v. Liberty Mutual Insurance Co.*, 620 F.2d 1368, 1370 (9th Cir. 1980); *Republic Pictures v. Rogers*, 213 F.2d 662 (9th Cir.), *cert. denied*, 348 U.S. 858, 75 S.Ct. 83, 99 L.Ed. 676 (1954). After reviewing the record, we find the district court's interpretation of the MLA to be reasonable and correct.

III. *Northwest's Appeal*

[4] The district court found that Frank Sandoval was also an independent contractor and as such could not be considered an employee of Northwest. Under the Restatement guidelines set forth above, this conclusion is correct. Sandoval owns his business and has other customers besides Northwest. Sandoval sets his own hours and billing rates and is not supervised by any of his customers, including Northwest, except to the extent that the customer dictates what it wants accomplished. Although Northwest does lease its fully-equipped facilities to Sandoval, who drives a truck insured and owned by Northwest, there is no evidence that Northwest controls or has the power to control Sandoval who ran his own heavy duty repair business for over four years before acquiring Northwest as a customer. Accordingly we affirm the district court's finding that Sandoval was an independent contractor.

We also affirm the district court's finding that, under the MLA, Northwest was obligated to employ its own employees for repair work and that therefore it breached the MLA by employing Sandoval. The MLA provides in pertinent part:

> Nothing in this Agreement shall limit the right of Contractors to utilize machinery and equipment dealers to perform major repairs on machinery and equipment on or off the jobsite. All other maintenance and repairs which are normally and customarily performed by persons in the classification of Heavy Duty Repairman/ Welder shall be performed by employees covered by this Agreement. . . .

At trial it was established that Sandoval does routine repair work previously done by his predecessor, Hutchison, a heavy duty repairman who was a union employee of Northwest. Initially, Hutchison worked for Northwest without joining the union. His non-union employment was the subject of grievance proceedings. As a result of the proceedings, Northwest began contributing to the trust funds on Hutchison's behalf. The record reflects that Sandoval characterizes his occupation as "heavy duty repairman/welder" and uses the tools of a working mechanic in that classification. Thus the district court properly found that Northwest breached the MLA by assigning routine repair work to Sandoval.[2]

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[2]Northwest asserts that the district court should have refused to enforce the MLA on the theory that the MLA embodied an unfair labor practice forbidden by section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e). We have previously held that "district courts may not decide, independent of the NLRB, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a section 301 action." *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979). *See also Orange Belt District Council of Painters No. 48 v. Maloney Specialties, Inc.*, 639 F.2d 487, 491 (9th Cir. 1980). Northwest attempts to distinguish *Waggoner* on the ground that, unlike the employer in *Waggoner*, Northwest filed unfair labor practice charges with the NLRB which were later dismissed. Northwest's distinction is unpersuasive. Collateral relitigation of charges dismissed by the NLRB is inconsistent with the policies expressed in *Waggoner*; accordingly, we decline to entertain Northwest's section 8(e) defense.

IV. *Costs, Attorney's Fees, and Liquidated Damages*

[5] The district court declined to grant attorney's fees, costs, or liquidated damages to either party. Northwest argues that it should have been awarded fees under Cal.Civ.Code § 1717 which states:

> In any action on a contract, where such contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract, shall be awarded to one of the parties, the prevailing party, whether he is the party specified or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), prohibits a federal court from awarding attorney's fees under state statutes allowing such fees unless the court's jurisdiction is based upon diversity of citizenship. Therefore section 1717 is inapplicable to the instant case. Northwest argues that section 1717 applies here by quoting *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957), to the effect that "state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy." Northwest argues that the mutuality requirement embodied in Cal.Civ.Code § 1717 assures that parties to collective bargaining agreements, as well as third party beneficiaries thereof, will not be coerced into abandoning good faith, meritorious defenses to section 301 claims, and that section 1717 is certain to temper the invocation of federal jurisdiction for the enforcement of questionable contract claims.

We read *Alyeska*, however, as imposing strict limits on the use of state law to support attorney's fees awards. Those limits were not overborne by the federal environmental pol-

icies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the policies asserted by Northwest in this case. In fact, federal labor policy supports the district court's decision to decline to award fees under section 1717. "Courts must always evaluate litigation under 301(a) with an eye to the policy of uniformity which that statute embodies." *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir. 1979). Uniformity would be defeated, with few, if any, countervailing benefits, by applying fifty different state laws on the issue of attorney's fees. Of course, this example is distinguishable from the situation where the parties provide for attorney's fees in their collective bargaining agreement. There, the federal labor policy of enforcing the parties' intent as expressed in their negotiated agreement is paramount. *Cf. Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1236 (9th Cir. 1979) ("Courts and arbitrators are permitted to resolve disputes governed by the terms of collective bargaining agreements despite potential conflicts with the NLRB . . . because of the national labor policy favoring resolution of disputes through mechanisms established by the parties to the disputes."). The district court's denial of attorney's fees and costs to Northwest is affirmed.

[6] On the other hand, the district court's denial of attorney's fees, costs, and liquidated damages to the Trustees is reversed. Unlike Northwest, who based its claim for fees on state law, the Trustees base their claim on the following provision of the MLA:

> All signatory Employers found to be delinquent shall pay for all legal and auditing costs in connection with such delinquency, plus liquidated damages in the amount of twenty-five dollars ($25.00) or ten percent (10%) of the total sums of the contributions, whichever

> is greater to the Operating Engineers Health and Welfare Fund.

The district court found that this provision of the MLA applies only when an employer fails to contribute to the trust funds on behalf of its employees and not when the employer fails to contribute on behalf of wrongfully hired independent contractors and their employees who displace union members.

We agree with the Trustees that the district court read the MLA too narrowly. On remand, the district court should determine the amount of attorney's fees, costs, and liquidated damages to be awarded to the Trustees by virtue of the delinquency that resulted when Northwest wrongfully hired Sandoval and his helpers to perform protected union work.

AFFIRMED in part and REVERSED AND REMANDED in part; parties to bear their own costs on appeal.

APPENDIX D.

Order of the Court of Appeals for the Ninth Circuit, Denying Respondent's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiff-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., etc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: May 15, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The petition for rehearing is denied.

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*The Hon. Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX E.

Order of the Court of Appeals for the Ninth Circuit, Denying Petitioner's Motion for Reconsideration.

United States Court of Appeals for the Ninth Circuit.

William C. Waggoner, et al., etc., Plaintiff-Appellees and Cross-Appellants, vs. Northwest Excavating, Inc., Defendant-Appellant and Cross-Appellee. Nos. 78-2816, 78-2984.

Filed: August 5, 1981.

Before: PREGERSON and NELSON, Circuit Judges and TURRENTINE,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing. Judges Pregerson and Nelson have voted to reject the suggestion for rehearing en banc and Judge Turrentine has recommended such rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F.

Supreme Court of the United States.

No. 81-843.

Northwest Excavating, Inc., Petitioner, v. William C. Waggoner, et al.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Kaiser Steel Corp. v. Mullins*, 455 U.S. ___ (1982).

IT IS FURTHER ORDERED that the petitioner, Northwest Excavating, Inc., recover from William C. Waggoner, et al. Two Hundred Dollars ($200.00) for its costs herein expended.

February 22, 1982.

Clerk's costs: $200.00.

APPENDIX G.

William C. Waggoner, et al., Plaintiffs-Appellees/Cross-Appellants, v. Northwest Excavating, Inc., Defendant-Appellant/Cross-Appellee. Nos. 78-2816, 78-2984.

United States Court of Appeals, Ninth Circuit.

Sept. 3, 1982.

Trustees of union trust funds brought action to recover employee fringe benefits contributions from construction equipment rental company. The United States District Court for the Central District of California, Robert J. Kelleher, J., entered judgment for trustees in part and the company in part, and cross appeals were taken. The Court of Appeals, 642 F.2d 333, affirmed in part and reversed and remanded in part, and certiorari was granted. Following remand, one of 102 S.Ct. 1417, the Court of Appeals, Pregerson, Circuit Judge, held that evidence sustained finding that provision of collective bargaining agreement specifying that, except for major repairs, all other maintenance and repairs normally and customarily performed by persons in specified classifications would be performed by employees covered by the agreement did not violate statute forbidding labor agreements under which employer agrees to cease doing business with, or to cease handling the products of, another employer, since the purpose of the provision was work preservation.

Earlier opinion reaffirmed.

Wayne Jett, Los Angeles, Cal., for Waggoner.

Stanley E. Tobin, Los Angeles, Cal., argued, for defendant-appellant and cross-appellee; James G. Johnson, Hill, Farrer & Burrill, Los Angeles, Cal., on brief.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON and NELSON, Circuit Judges, and TURRENTINE,* District Judge.

PREGERSON, Circuit Judge:

This case is before us on remand from the Supreme Court, *Northwest Excavating Inc. v. Waggoner*, ___ U.S. ___, 102 S.Ct. 1417, 71 L.Ed.2d 640 (1982). The Court vacated our earlier opinion, *Waggoner v. Northwest Excavating, Inc.*, 642 F.2d 333 (9th Cir. 1981) and remanded the case for further consideration in light of *Kaiser Steel Corp. v. Mullins*, ___ U.S. ___, 102 S.Ct. 851, 70 L.Ed.2d 833 (1982).

In Kaiser Steel, the Supreme Court ruled that a court must entertain a "hot cargo" defense under 29 U.S.C. § 158(e) ("Section 8(e)")[1] "where [that] defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought . . . ." 102 S.Ct. at 860.

In *Waggoner*, we declined to address a section 8(e) defense because of our prior ruling that "district courts may

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*The Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

[1]Section 8(e), codified at 29 U.S.C. § 158(e), forbids labor agreements under which an employer agrees to cease doing business with, or to cease handling the products of, another employer (hot cargo provision). Specifically it provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . . to cease doing business with any other person, and any contract or agreement . . . containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

not decide, independent of the National Labor Relations Board, the merits of an unfair labor practice defense to enforcement of a collective bargaining agreement in a Section 301 action." 642 F.2d at 338, n.2, citing *Waggoner v. R. McGray, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1981).

The Supreme Court in *Kaiser Steel* rejected the argument that the legality under section 8(e) of a contested provision of a labor agreement can be decided only by the NLRB. *Id.*, 102 S.Ct. at 859-60. We therefore address Northwest's section 8(e) defense.

The particular aspect of this case to which the section 8(e) defense is relevant concerns the status of one Frank Sandoval and his helpers, hired by Northwest in November 1975 to repair and maintain its construction equipment. Previously, Northwest had used its own employees to do this work. We agreed with the district court's determination that Sandoval was, as Northwest contended, an independent contractor rather than a Northwest employee. We ruled, however, that by hiring Sandoval, Northwest had breached a provision of the collective bargaining agreement specifying that, except for major repairs, "[a]ll other maintenance and repairs which are normally and customarily performed by persons in classification of Heavy Duty Repairman/Welder shall be performed by employees covered by this agreement." We therefore held that Northwest was liable to the trustees of four union trust funds for employee fringe benefit contributions based on hours worked by Sandoval and his crew. Northwest argued that the provision which it had breached was an unlawful hot cargo clause because that provision required Northwest to cease doing business with Sandoval and his crew if they refused to become Northwest's employees or to become and remain members of the union.

The district court below did consider Northwest's hot cargo defense and found that the challenged provision did not violate section 8(e). We must review that ruling and determine if it is supported by substantial evidence. *National Woodwork Manufacturers' Association v. NLRB*, 386 U.S. 612, 646, 87 S.Ct. 1250, 1269, 18 L.Ed.2d 357.

The key question we must address is whether, under all the surrounding circumstances, the union's objective in negotiating the contested contractual provision was preservation of work for Northwest's employees, or whether the provision was calculated to satisfy union objectives elsewhere. *Id.* at 644-46, 87 S.Ct. at 1268-1269. We emphasize that section 8(e) does not prohibit labor agreements made and maintained to pressure an employer to preserve for its employees work traditionally done by them. *Id.* at 635, 87 S.Ct. at 1263. Relevant to this issue, we stated in our earlier opinion:

> At trial, it was established that Sandoval does routine repair work previously done by his predecessor, Hutchison, a heavy duty repairman *who was a union employee of Northwest*. Initially, Hutchison worked for Northwest without joining the union. His non-union employment was the subject of grievance proceedings. As a result of the proceedings, Northwest began contributing to the trust funds on Hutchison's behalf.

642 F.2d at 338 (emphasis added).

Based on trial testimony it is clear that, as applied to Sandoval, the purpose of the contested provision was work preservation. Thus the district court correctly concluded that the challenged provision did not violate section 8(e).

In light of the foregoing, we reaffirm our earlier decision which affirmed in part, reversed in part, and remanded the matter to the district court for further proceedings.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-923

IN THE

Supreme Court of the United States

October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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Question Presented.

Whether a federal court, in an action brought under Section 301 of the Labor Management Relations Act, may consider or apply both state law and related federal statutes which authorize an award of attorney's fees to the prevailing party in a breach of contract action?

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No. 82-923

IN THE

Supreme Court of the United States

October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

BRIEF IN OPPOSITION.

Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1982, be denied.

Statutes Involved.

This case involves Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185(a), Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 94 Stat. 1295, 29 U.S.C. § 1132(g), and California Civil Code Section 1717.

Section 502(g)(1) of ERISA provides as follows:

> "In any action under this title *(other than an action described in paragraph (2))* by a participant, beneficiary, or fiduciary, the court in its discretion may allow

a reasonable attorney's fees and cost of action to either party." (Emphasis added.)

The portion of the statute given emphasis above is erroneously omitted from the text of the statute set forth in Appendix A of the petition. (Pet. App., p. 1.)

Statement of the Case.

This case arose when respondents, as trustees of four labor-management employee benefit trusts ("Trustees"), brought suit against petitioner Northwest Excavating, Inc. ("Northwest") seeking recovery of delinquent fringe benefit contributions. Contributions were claimed to be due from Northwest based on the employment duties of a workman (Sandoval) and his helpers who performed equipment maintenance and repair for Northwest. In addition, contributions were claimed to be due on work performed by "owner-operators" furnished by Northwest to operate heavy equipment on construction jobsites.

The rights of the Trustees to receive payments from Northwest arise under the Mastor Labor Agreement between the Southern California General Contractors Associations and the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), to which Northwest is bound as an employer association member. With certain irrelevant exceptions, the Master Labor Agreement requires that all equipment maintenance and repair work be performed by employees of the signatory contractor (*i.e.*, Northwest). The district court concluded that Northwest had breached the Master Labor Agreement by subcontracting maintenance and repair work to Sandoval as an independent contractor, and awarded damages to the Trustees in the amount of contributions which would have been payable absent the breach.

Further, the Master Labor Agreement requires the "Contractor" (expressly defined as the employer signatory to the Master Labor Agreement) to make each owner-operator a *bona fide* employee and to pay the owner-operator by separate checks for wages and for equipment rental. The Master Labor Agreement expressly prohibits any scheme or device to circumvent these requirements concerning coverage of owner-operators. However, viewing the Master Labor Agreement as unambiguous and requiring no extrinsic evidence of intent in this respect, the district court ruled that Northwest could act as a "broker" for owner-operators without violating the Master Labor Agreement. The ruling of the district court permitted Northwest to treat the owner-operator as an independent contractor and bill each of Northwest's customers for the services of the owner-operator, then pay the owner-operator the amount collected, less a percentage commission fee of 7%, without violating the Master Labor Agreement.

The district court found no violation of § 8(e) of the National Labor Relations Act (the "Act") [29 U.S.C. § 158(e)], as alleged by Northwest, in the Master Labor Agreement provisions relating to the maintenance and repair work performed by Sandoval. The district court declined to award attorney's fees either to the Trustees or to Northwest, although the Master Labor Agreement provides that the Trustees are entitled to recover the attorney's fees incurred in collecting delinquent amounts.

The Court of Appeals affirmed the district court's ruling that Northwest breached the Master Labor Agreement by subcontracting maintenance and repair work to Sandoval, and affirmed the award of damages to the Trustees. The Court of Appeals initially declined to entertain Northwest's defense that the maintenance and repair provisions of the Master Labor Agreement violate § 8(e) of the Act. How-

ever, after its original decision was vacated and the case remanded by this Court for further consideration in light of *Kaiser Steel Corporation v. Mullins*, 455 U.S. ___, 102 S.Ct. 851 (1982), the Court of Appeals considered the merits of the § 8(e) defense and affirmed the district court's conclusion that no § 8(e) violation had occurred. Northwest's petition does not challenge this ruling by the Court of Appeals.

On the Trustees' appeal, the Court of Appeals affirmed the district court's conclusion that Northwest treated the owner-operators as independent contractors rather than employees. (Pet. App., p. 19.) Considering the interpretation of the Master Labor Agreement provisions concerning owner-operators to be a question of law subject to *de novo* review, the Court of Appeals adopted the district court's view that the Master Labor Agreement permits Northwest to act as a "broker" and to deal with the owner-operators as independent contractors without making each owner-operator its *bona fide* employee. (Pet. App., pp. 20-21.)

Finally, the Court of Appeals ruled that the Trustees were entitled to enforce their rights under the Master Labor Agreement to recover liquidated damages, audit expenses and attorney's fees incurred in the suit against Northwest, but that no statutory or contractual authority exists for an award of attorney's fees to Northwest in the case. (Pet. App., pp. 23-25.) These aspects of the first decision of the Court of Appeals were reaffirmed without further comment in the second decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT.

I.

The Petition Fails to Present a Justiciable Issue.

Northwest seeks a ruling by this Court that § 301 of the LMRA authorizes federal courts to consider "both state law and related federal statutes" as grounds for adopting a "mutuality principle" by which attorney's fees could be awarded to the prevailing party whenever either party has a contract right to recover such fees. Although that premise is erroneous, as will be shown, the ruling sought by Northwest would not enable Northwest to recover attorney's fees in this case. Therefore, Northwest has no justiciable interest in obtaining a ruling on the issue.

Specifically, Northwest seeks application of California Civil Code § 1717, which authorizes award of attorney's fees to the "prevailing party" in a breach of contract action when the contract entitles either party to recover attorney's fees. However, the language of § 1717 expressly states that " 'prevailing party' means the party in whose favor final judgment is rendered." (Pet. App., p. 2.) Final judgment in this case was entered in favor of the Trustees. (Pet. App., p. 11.) That judgment was affirmed by the Court of Appeals, and Northwest no longer contests the validity of that ruling. Accordingly, even if § 1717 were applied in this case, Northwest could not recover its attorney's fees.

Although Northwest argues only for the adoption of a "mutuality principle" and not for a rule allowing "discretionary" awards of attorney's fees to either party, even a discretionary rule similar to those cited by Northwest as applicable in other types of actions [§ 502(g) of ERISA and § 4301(e) of the Multiemployer Pension Plan Amendments Act] (Pet. App., p. 7) would not avail Northwest in this

case. The district court in this case specifically declined to award attorney's fees to Northwest.[1]

Since neither a "mutuality principle" nor a discretionary rule authorizing attorney's fees awards in § 301 actions would benefit Northwest in this case, the issue is merely hypothetical and does not amount to a controversy "touching the legal relations of the parties." *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937). If "a controversy [is] to be justiciable, the court must be able to afford effective relief"; a ruling that could not enable Northwest to recover attorney's fees in this case would be "simply an advisory opinion." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 45 (2nd Cir. 1976); *affirmed sub nom. Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977).

II.

Federal Courts May Not Fashion a Rule Applicable to Section 301 Suits Authorizing an Award of Attorney's Fees to the Prevailing Party Under a "Mutuality Principle" as Urged by Northwest.

The petition correctly asserts that the Court of Appeals rejected the application of state law as a basis for awarding attorney's fees to Northwest in this Section 301 suit, but *incorrectly* asserts that state law was rejected in order to "create a uniform national attorney's fees rule in Section 301 actions." (Pet., p. 6; *cf.* Pet. App., pp. 23-24.) To the contrary, the Court of Appeals rejected both the application of state law and the alternative argument that Northwest

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[1]The district court's determination that Northwest is not entitled to recover attorney's fees is made as a finding of fact, rather than as a conclusion of law (Pet. App., p. 7), demonstrating that the denial of attorney's fees to Northwest resulted from an exercise of discretion by the district court.

now makes to this Court: that "the mutuality principle embodied in California Civil Code Section 1717 [by which the 'prevailing party' may be awarded attorney's fees if either party has a contract right to recover such fees] is consonant with the explicit congressional design behind the national labor laws" (Pet., p. 7), and "should be imported [sic] in federal labor law . . ." (Pet., p. 9.)

As the Court of Appeals recognized, this Court's holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975), precludes federal courts from applying state law or fashioning a federal rule based on policy arguments as a basis for awarding attorney's fees to a party in a suit arising under federal law. In *Alyeska Pipeline*, this Court stated:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.*, 421 U.S. at 269, 95 S.Ct. at 1627.[2]

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[2]The Court had already noted that the practice of applying state law as authority for awarding attorney's fees in suits arising under federal law was discontinued in 1853 by Congressional legislation. *Id.*, 421 U.S. at 250-53, 95 S.Ct. at 1618-19.

Moreover, in rejecting the request of the Wilderness Society that the Court embark on a course of adopting judicially created law authorizing awards of attorney's fees, this Court raised rhetorically several questions which would inevitably be confronted if the Court were to acquiesce in following that path. One of the questions was whether the courts should then "opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff?" *Id.*, 421 U.S. at 263-64, 96 S.Ct. at 1625.

The petition fails entirely to discuss the controlling effect of this Court's decision in *Alyeska Pipeline*. Instead, the petition cites the inapposite decision of this Court in *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S.Ct. 1107 (1966), which deals with selection of the appropriate statute of limitations to be applied in § 301 suits (and concluding that the appropriate state statutes of limitations should be applied). The decision in *Hoosier Cardinal* does not detract in any way from the holding of *Alyeska Pipeline*.

Otherwise, the petition merely states its own views of policy arguments supporting adoption of the "mutuality principle" proposed for adoption and application in § 301 suits. The Court of Appeals rejected those arguments, stating:

> "We read *Alyeska* . . . as imposing strict limits on the use of state law to support attorney's fees awards. Those limits were not overborne by the federal environmental policies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the policies asserted by Northwest in this case." (Pet. App., pp. 23-24.)

The Court of Appeals then proceeded to note that the federal law applicable in § 301 suits includes strong policies favoring uniformity in the law applicable to interpretation and enforcement of collective bargaining agreements, and favoring enforcement of the contract as agreed by the parties, rather than as modified by state statutes. Both of these policies run counter to Northwest's arguments.

Additional policy concerns are that the "mutuality principle" proposed by Northwest "would discourage trust funds from pursuing potentially valuable claims against employers for delinquent payments for fear that the liability for attorney's fees might outweigh the benefits", and that

the awards made under such a rule "would inevitably diminish the amount in the trust fund available for the benefit of employees." *Burke v. French Equipment Rental, Inc.*, 498 F.Supp. 94, 101 (C.D. Cal. 1980); *affirmed in pertinent part*, 687 F.2d 307, 312 (9th Cir. 1982). These were among the policies underlying the recent enactment of § 515 of ERISA, 94 Stat. 1295, 29 U.S.C. § 1145, establishing a statutory duty to pay fringe benefit contributions due under collective bargaining agreements, and the revision of § 502(g) of ERISA (*supra*, pp. 1-2, and Pet. App., pp. 1-2) making mandatory the award of attorney's fees and other amounts to employee benefit plans when such plans have recovered delinquent contributions, but making no provision for awarding attorney's fees to employers who successfully defend such suits for delinquent contributions.

III.

If the Court of Appeals Had Not Erred in Construing the Master Labor Agreement, Northwest Would Not Have Prevailed on Any Issue and Could Not Claim Entitlement to Attorney's Fees.

The only issue on which Northwest prevailed in the Court of Appeals involved interpretation of the Master Labor Agreement provisions governing use of owner-operators. The Master Labor Agreement requires the "Contractor" (expressly defined as the employer signatory to the Master Labor Agreement) to make each owner-operator a *bona fide* employee and to pay the owner-operator by separate checks for wages and for equipment rental. The Master Labor Agreement specifically prohibits "any scheme to defeat the terms" governing owner-operators. The Master Labor Agreement makes no provision for the signatory employer to act as a "broker" for owner-operators. Yet the Court of Appeals, on *de novo* review of the Master Labor Agree-

ment provisions, affirmed the district court's view that Northwest could act as a "broker" for owner-operators, receiving full compensation from whatever customer Northwest's owner-operator serves, then deducting a seven percent "brokerage commission" before transmitting the remaining compensation to the owner-operator. (Pet. App., pp. 20-21.) The district court ruled that only the "general contractors" for whom Northwest furnished owner-operators have the obligations under the Master Labor Agreement to treat the owner-operators as their *bona fide* employees (Pet. App., pp. 6, 9-10.) Of course, the "general contractors", even if signatory, could not possibly abide by the Master Labor Agreement by treating the owner-operators as employees, paying separate checks for wages and for equipment rental and paying contributions to the Trusts, while at the same time paying the entire compensation to Northwest for deduction of a "brokerage commission" before transmittal to the owner-operator.

Properly construed, the Master Labor Agreement requires Northwest to treat owner-operators as its employees and to pay related contributions to the Trustees. With a correction of this error, Northwest would prevail on no issue, and would have no basis for claiming entitlement to attorney's fees on any theory.

Conclusion.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: December 13, 1982.

Respectfully submitted,

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